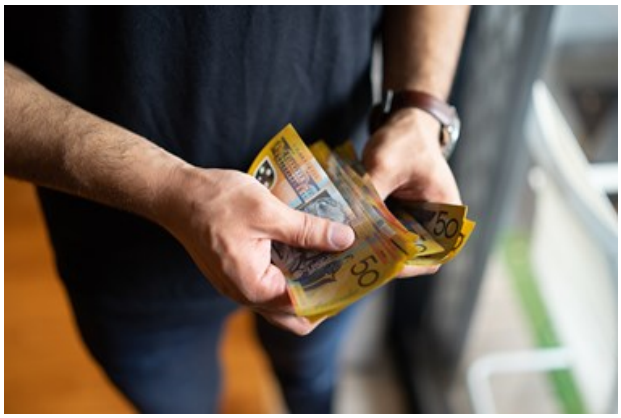

Was it a gift or a loan? The difference is critical in family law property settlement

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It's not uncommon for couples to have received money or other property from friends and family (for example parents or grandparents), during their relationship. Determining whether that money or property is classified as a gift or a loan can affect the outcome of any property settlement negotiations after separation.

Gifts vs loans – why does it matter?

It is very common for parties to receive money or other property from parents or family members throughout their relationship. It can take the form of a direct financial contribution (for example, a monetary payment for the deposit on the couple's first home) or an indirect financial contribution (for example, one of the parties' parents letting the couple live with them rent-free).

If this payment is a loan, it means it will need to be paid back to the lender.

When negotiating and formalising a property settlement, this will be taken into account and finalised accordingly. There are a few options in deciding how to deal with the liability, and it may depend on what kind of loan it is and how much the loan is for. For example, the parties could pay off the loan from the asset pool, or one party could keep the property and assume liability for repayment of the loan.

If the payment is a gift, it is considered a contribution to the relationship, made by the party who received the gift. It will therefore be taken into account when assessing the contributions-based entitlements of the parties.

For example, if the husband's parents gave him a monetary gift to contribute to the purchase of a property, this will usually be attributed as a contribution made by the husband. The husband may well be entitled to a greater adjustment in his favour due to this extra contribution – although it will of course depend on the circumstances of the matter.

It can become trickier when there is a question of whether the gift was given to one of the parties or both. Where the gift is determined to be for both of the parties, it is no longer deemed to be a contribution from one party that will increase their entitlements. This is explained more below.

Was it a loan?

There is no 'checklist' of requirements that must be met in family law for property to be considered a loan. If a party wishes to assert that the property is a loan, they will need to show evidence (usually in writing), to back up that claim.

Therefore, loans from family members or friends should be properly documented and executed in order to be considered a debt that needs to be repaid. In many family law cases, a party will claim that a debt must be repaid to a family member when in fact it was either intended as a gift or does not need to be repaid.

Courts have become very strict about these purported 'loans' in recent years. Unless the arrangement has the usual indicators of a loan (including repayments being required and interest being charged), then it is unlikely to be seen as a loan.

Where the court does not wholly accept the argument/evidence that the contribution was a loan, and therefore to be deducted from the asset pool, then the court may adopt the position that it is a gift, and so becomes a contribution made on behalf of the party who received the gift.

Gifts to one of the parties

In the absence of evidence to show the property is a loan, the court will usually consider it to be a gift. In certain circumstances, such as a parent-child relationship, there will be an (unofficial) assumption that any gift is to that child alone (although there is no actual legal presumption).

This will usually be the case unless there is evidence to show otherwise; that is, evidence that the gift was intended to be to both of the parties. The court will look at the donor's intention at the time, to determine whether the gift was intended to be a gift to one of the parties, or both. There is no one way to definitely prove the intention of the donor. It will be a matter of analysing the facts of each different case.

Where the property is found to be a gift to one of the parties only, it will still be included in the asset pool. It will be taken into account when considering the parties' contribution-based entitlements when formalising property settlement. In general terms, the party who contributed more throughout the relationship is entitled to more at the end of the relationship.

Gifts to both parties

Where a gift is ostensibly made to both parties (for example, a monetary gift paid into a joint account or transferring a property that has both parties' names on the title), the court may have regard to 'motivating circumstances' behind the gift. An example of this is where the gift was made to both parties to please their child.

In these circumstances, the court may still regard the gift as a contribution on behalf of one of the parties. An example of this is where parents allow their child and their child's partner to live in their home rent-free. Although the accommodation benefits both parties, the court may consider that the gift was really made to benefit the donor's child, even though the donors were aware that both parties would benefit.

However, if the 'motivating circumstances' are found to be that the donors were genuinely giving a gift to both parties, the property will form part of the asset pool and will not be considered a contribution from only one party. It will be deemed to be a contribution from both parties, and there will be no adjustment in entitlements for either party in regard to the gift.

How a family lawyer can help

The lines between what is classified as a gift or a loan from family members and friends can be blurry. It is prudent to seek legal advice to see how the law applies to your specific circumstances to ensure you protect your financial interests in the event of separation.

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